Supreme Court, U. S.
FILED
OCT 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

I. VASILIOS,

79-611

Defendant and
Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and
Respondent.

ADDENDUM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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VOLUME II

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QUESTIONS PRESENTED

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1. Did the admission into evidence of co-defendant Brewer's extrajudicial statement directly implicating petitioner with the alleged crimes violate petitioner's Sixth Amendment right to confrontation?

2. What are the trial court's responsibilities to avoid Confrontation Clause violations, without limiting the introduction of evidence at trial?

3. Under what circumstances, if any, may a trial court permit the admission of an extra-judicial statement, despite serious jeopardy to a defendant's right to confrontation, as an alternative to restricting its exercise of discretion in furtherance of judicial economy?

REASONS FOR GRANTING THE
WRIT

Not since 1970 has the United States Supreme Court issued a major pronouncement on the Confrontation Clause of the Sixth Amendment. In a series of decisions beginning in 1965, the Court delineated the intricacies in determining Confrontation Clause violations. The instant case provides an opportunity for further clarification of the developing doctrine, and raises, for the first time, the question of the trial judge's responsibilities to avoid Confrontation Clause violations without limiting the introduction of evidence at trial.

While courts have long struggled with the question of what substantive limitations, if any, are placed by the Confrontation Clause on the introduction of evidence, it was in Pointer v. Texas, 380 U.S. 400 (1965) that the Supreme Court began to delineate the precise relationship between the right of confrontation and the introduction of evidence. In Pointer the alleged victim testified against the defendant

at the preliminary hearing, at which the defendants were unrepresented by counsel. At trial, the Government introduced, over objection, the transcript of the preliminary hearing, because the victim was unavailable to testify at trial. Writing for a unanimous Court, Justice Black reversed the convictions as violative of the Sixth Amendment right to confrontation. The Court explained that the Confrontation Clause includes: first, a right of cross-examination, a central purpose of which is to "expose falsehood and bring . . . out the truth in the trial of a criminal case." 380 U.S. at 404; and second, intrinsic "fundamental" values, essential to due due process. Id. at 404-405. On the other hand, the Court observed, the dictates of the Clause are not absolute; some evidence, technically hearsay, may nevertheless be admissible where the evidence in question satisfied certain yet unspecified indicia of reliability. Id. at 407.

In a companion case, Douglas v. Alabama, 380 U.S. 415 (1965), the Supreme Court further elaborated upon its Pointer reflections. The Court in Douglas addressed the question, left open in Pointer, of which hearsay declarations, when admitted into evidence without affording proper cross-examination of the declarant, constitute a violation of the Confrontation Clause. In Douglas two defendants were tried separately on charges of assault to murder. After the first defendant, Loyd, was convicted, he was called to testify at the trial of the second. Because he planned to appeal his conviction, however, Loyd refused to answer any questions. Thereupon, the prosecutor read aloud to the

jury Loyd's confession, which incriminated the petitioner.

In unanimously reversing the petitioner's conviction, the Court elucidated that hearsay evidence which is both harmful to the defendant and essential to the prosecution's case is of the variety which is violative of the Confrontation Clause. Hearsay which is harmful to the defendant includes (1) testimony substantially linking the defendant to the crime; and (2) testimony which names or identifies the defendant as a participant. Furthermore, hearsay which is essential to the prosecution's case emphasizes the concern that admission of the hearsay was not harmless error.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court introduced a new element, the ineffectiveness of a curing instruction, to the developing doctrine. In Bruton, two defendants, Evans and Bruton, were jointly tried. At trial, the Court admitted into evidence testimony of Evan's extrajudicial statement implicating Bruton as an accomplice. An instruction limiting the jury's use of the confession as against Evans, but not Bruton, was given. In reversing Bruton's conviction, the Court explained that the hearsay statement which was "powerfully incriminating" of Bruton could not be cured by a limiting instruction. The Court re-emphasized the harm-focused concept of Douglas and introduced the consideration of risk that the jury would make improper use of the inadmissible hearsay. Id. at 135.

So, as of 1968, the application of the Confrontation Clause, for purposes of regulating the introduction of hearsay evidence, required consideration of several factors. These included: the harm to the defendant; the essentiality of the evidence to the prosecution's case; the possible ineffectiveness of curing instructions; and, to some extent, the inherent reliability of the evidence. In the years following Bruton, the Supreme Court's emphasis shifted to a consideration of the reliability of the hearsay evidence.

In California v. Green, 399 U.S. 149 (1970), the Court established "reliability" as a prominent factor in the Confrontation Clause analysis. In that case, the Court considered the conviction of Green for the sale of marijuana to a minor, Porter. At Green's trial, Porter, called as a witness by the prosecution, could not recall the underlying facts of the sale. Thereupon, the prosecution successfully introduced, for substantive purposes, the testimony which Porter had given at a preliminary hearing. The trial court also admitted into evidence incriminating statements made by Porter while in police custody. The California Supreme Court upheld the reversal of Green's conviction, holding unconstitutional the California statute under which Porter's statements were admitted.

The United States Supreme Court vacated the judgment. The Court, emphasizing that there is not a complete "congruence" between hearsay and confrontation, 399 U.S. at 155, explained that the "core" of the Confrontation Clause is the "literal right to 'confront' the witness at time of trial. . . ." Id. at 157. Because Porter was

available for cross-examination at trial, and because his preliminary hearing testimony was contemporaneously subject to cross-examination, the Court found no constitutional infirmity in its introduction against Green. However, the Court remanded the cause for consideration whether Porter's inability to recollect at trial was sufficient to establish the reliability of Porter's statements to the police.

In holding that the use at trial of a witness' extrajudicial statement as substantive evidence did not violate the Confrontation Clause, so long as the witness was available for competent cross-examination, the Court underscored the significance of the reliability of the hearsay evidence. The Court distinguished Pointer, Douglas, and Bruton on the ground that the declarants in those cases were not available for cross-examination. Id. at 162-163.

In its holding in Green, the Court also postponed further elaboration of the concept, developed in the prior cases, that it is the effect of the introduction of hearsay evidence on the defendant's claim to innocence and the prosecution's attempt to prove its case that is controlling under a Confrontation Clause analysis. It was unnecessary for the Court in Green to proceed to a consideration of effect, for in Green the basic assumption underlying an effect analysis, namely the non-existence of cross-examination of the declarant, was absent. Consequently, in Green the Court indicated that the admissibility of hearsay evidence will not be violative of the Confrontation Clause if sufficiently reliable, that is, subjected to

competent cross-examination, regardless of the effect of its introduction at trial.

The complexity of the Confrontation Clause doctrine was exemplified by the Supreme Court's next decision, Dutton v. Evans, 400 U.S. 74 (1970) wherein, perhaps due to that complexity, the Court reached no majority decision. In that case, the prosecution presented twenty witnesses implicating Evans in an alleged murder. One of these witnesses, Shaw, testified that a third culprit, Williams, had told him in a spontaneous declaration, of Evans' guilt. Williams was not called to testify, but his statement to Shaw was admitted at trial against Evans. In a 5-4 decision, the Court reversed the Fifth Circuit's granting of habeas corpus, and remanded for other issues raised in Evans' motion.

Writing for the plurality, Justice Stewart held that no Confrontation Clause violation had occurred. At the crux of the opinion was the Court's conclusion that: (1) the need for cross-examination of the declarant was obviated by sufficient "indicia of reliability" id. at 89, of the truth of the statement, based on the spontaneity of Williams' remark and its adverseness to his penal interest; and (2) the hearsay statement was not "crucial" or "devastating," id. at 87, to the defendant's case, as the prosecution presented other significant proof of guilt.

Thus, Supreme Court doctrine delineating the precise relationship between the Confrontation Clause and the introduction of evidence is imbued with intricacies. The Supreme Court has set forth

the relevant factors, which must be applied to the circumstances of each case; (1) the extent to which the declarant of the extrajudicial statement was subjected to competent cross-examination; (2) whether the extrajudicial declaration was so plainly reliable or so merely cumulative that cross-examination of the declarant would be superfluous; (3) the degree to which the challenged declaration directly accuses the defendant or otherwise links him to the crime; (4) the degree to which the challenged declaration is essential or significant to the prosecution's case; (5) whether, and the degree to which, the admissibility of the hearsay declaration creates a risk that the jury will improperly use it against the defendant. The equation is no doubt complex, and the answer rarely evident.

Applying these factors to the instant case, a significant new inquiry, or refinement, of Supreme Court doctrine emerges. At the outset, reference to the identity of the challenged hearsay declaration is in order. At trial, Harold Goldstein testified that co-defendant Brewer stated to him that Brewer and petitioner had devised the scheme to defraud, implemented such scheme and falsified a financial statement provided AMC (RT pp. 2156, 2186). Therefore, Brewer's extrajudicial statement to Goldstein, introduced to prove petitioner's guilt, was hearsay, admitted by way of Goldstein's in-court testimony.

The hearsay declarant, co-defendant Brewer was never subjected to cross-examination, and no other indicia of reliability of Brewer's statement was presented. (Green, Pointer, Dutton.)

Brewer's statement, however, directly accused and linked the petitioner with the commission of the alleged crimes. (Douglas, Bruton.) It is particularily noteworthy that the Fifth Circuit's opinion cites petitioner's "false and misleading information to the accountant preparing a financial statement (opinion at 6000), a conclusion derived principally, if not totally, from Goldstein's testimony, as strong evidence of petitioner's involvement in the fraudulent conspiracy. Moreover, the significance of the declaration to the prosecution's case is underscored by the paucity of other evidence introduced by the prosecution incriminating the petitioner in the knowing participation in a fraudulent scheme. (Douglas, Dutton.) Given the significance of the hearsay declaration, its admissibility undoubtedly created a substantial risk that the jury improperly used it to convict the petitioner. (Bruton.)

In light of such an apparent violation of petitioner's right to confrontation, the trial court, nevertheless, permitted the admission of the hearsay declaration. What is astounding is that there appeared a reasonable opportunity for the court to avoid a Confrontation Clause problem. The petitioner made four separate motions for severance, indicating to the Court that Brewer would provide testimony exonerating the petitioner if petitioner's trial was held subsequent to his trial (C.T. p. 3-5). Mr. Dean, Brewer's attorney, testified that if the Court alleviated the threat to Brewer's Fifth Amendment right against self-incrimination by modifying the sequence of trials, Brewer would deny that petitioner had any control over the underwriting firm, nor had any knowledge

of a false financial statement (RT p. 2848). Brewer would also testify that the alleged conversations with Goldstein never occurred (RT p. 2262). Nevertheless, the Court denied all four motions for severance, opting to permit the admission of evidence of Brewer's hearsay declaration under circumstances seriously jeopardizing the petitioner's Sixth Amendment right to confrontation.

The issue which this honorable Court should decide is what are the trial court's responsibilities to avoid Confrontation Clause violations without limiting the introduction of evidence at trial. More specifically, under what circumstances, if any, may a court permit the admission of a hearsay declaration, despite serious jeopardy to the defendant's Sixth Amendment right to confrontation, as an alternative to restricting its exercise of discretion to further the goal of judicial economy? In light of the complexity of Supreme Court doctrine, this as an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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